90-754

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

CALVIN J. PERKINS,

Petitioner,

v.

THE FARM CREDIT BANK OF WICHITA, CHERYL CLASS-ERICKSON, RODNEY CLASS-ERICKSON AND KATHERINE WUNDERLICH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether there is an implied private right of action under the right to first refusal provision of the Agricultural Credit Act of 1987. That provision requires Farm Credit System (FCS) institutions to afford farmers subject to foreclosure or voluntary conveyance in lieu of foreclosure an opportunity to repurchase their property from an FCS institution at or below market value before their farms are resold to a third party. 12 U.S.C. Section 2219a.

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CALVIN J. PERKINS,

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THE FARM CREDIT BANK OF WICHITA, CHERYL CLASS-ERICKSON, RODNEY CLASS-ERICKSON AND KATHERINE WUNDERLICH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Calvin J. Perkins respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the above-titled proceeding on August 17, 1990.

OPINIONS BELOW

The opinion of the court of appeals of which review is sought is attached as Appendix A (App. A, p. 1a). That ruling held that there is no private right of action under

12 U.S.C. Section 2219a. That ruling summarily affirmed the ruling of the district court granting summary judgment to the Respondents on the ground that there is no private right of action to enforce 12 U.S.C. Section 2219a. The district court's opinion is attached as Appendix B. (App. B, p. 4a).

JURISDICTION

The opinion of the court of appeals was entered on August 17, 1990. No petitions for rehearing were filed in the court of appeals. The court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Appendix C, p. 11a, sets out the pertinent provision of the Agricultural Credit Act of 1987, P.L. No. 100-233, 12 U.S.C. Section 2219a.

STATEMENT OF THE CASE

Jurisdiction Below

Jurisdiction in the district court was invoked under 28 U.S.C. Section 1331. Jurisdiction in the court of appeals was invoked under 28 U.S.C. Section 1291.

The Agricultural Credit Act of 1987

The Agricultural Credit Act of 1987, Pub. L. No. 100-233 (the Act) constituted a comprehensive and

detailed overhaul of the loan servicing requirements of the federally created and chartered Farm Credit System (FCS). The Act also authorized an infusion of up to $4 billion into the FCS to buoy up its cooperatively owned lending institutions and to prevent further losses to the farmer-shareholders who own those institutions. In all, the Act represents the most complete and intrusive congressional intervention into agricultural credit since the Great Depression.

Title I of the Act, "Assistance to Farm Credit System Borrowers," contains numerous mandatory loan servicing procedures which must be followed by FCS institutions. Because of Congressional judgment that one purpose of the Act was to keep family farmers on the farm[1] and to provide family farmers with homestead protection,[2] Congress included the right of first refusal in the Act.

Mr. Perkins' Situation

Calvin J. Perkins is a Colorado farmer and rancher. He owned approximately 9,200 acres of agricultural land in Archuleta County, Colorado. On March 28, 1989, the Farm Credit Bank of Wichita (FCB), an FCS institution, acquired certificates of purchase to nine parcels of Mr. Perkins' land, plus the water rights, at a sheriff's sale held pursuant to a state court foreclosure action initiated by FCB.

---

[1] Statement of Senator Pryor, 133 Cong. Rec. 16956 (November 2, 1987).

[2] H.R. No. 100-490, 100th Cong., 1st Sess., p. 178.

On April 17, 1989, FCB conveyed its interest in Parcel IV of Mr. Perkins' land to the Class-Ericksons for $28,415.81. On May 9, 1989, FCB conveyed its interest in Parcel IX, plus the water rights, to Ms. Wunderlich for $108,766.99 and $25,412.88 respectively. It is undisputed that FCB did not offer Mr. Perkins a right of first refusal prior to these conveyances. Mr. Perkins therefore lost the opportunity to repurchase his land at a market price as opposed to having to redeem it for the full amount of the debt.

Parcel IX was the key parcel to Mr. Perkins' ranching operation. It was the headquarters of that operation, was in adjacent proximity to two-thirds of his property, and was used as access to the remaining property. Mr. Perkins submitted an affidavit to the district court from his son-in-law, Dr. Murray K. Jacobs, stating that Dr. Jacobs would have been seriously interested in financing Mr. Perkins' requisition of these parcels had Mr. Perkins been offered his right of first refusal as required by the Act.

REASONS FOR GRANTING THE PETITION

The question of whether 12 U.S.C. Section 2219a creates an implied private right of action is an important question of federal law which has not been, but should be, settled by this court. The Farm Credit System is owned by its 600,000 borrower-shareholders. FCS lenders extend approximately 30 percent of all agricultural credit in the nation, with a current total of over $50 billion. Congress underscored the importance of the FCS with its

comprehensive overhaul of the system contained in the 1987 Act, and its infusion of $4 billion into the system.

The Agricultural Credit Act was passed at a time of grave financial difficulty for the FCS as a whole, and a time of grave financial crisis for tens of thousands of its borrowers. As the legislative history to the House version of the Act, H.R. 3030, indicates:

> Complaints about the rights of system borrowers being abused at both the association and district levels have been like a constant drumbeat in the offices of some members of Congress for several years.

H.R. Rep. No. 295 (I), 100th Cong., 1st Sess., p. 52. H.R. 3030 was reported to the floor of the House with the statement:

> In summary, I want to let the system and FCA know that together they destroyed the integrity of the 1985 Farm Credit Act and necessitated this year's legislation. The Congress cannot tolerate such irresponsible action again and we expect the system and its regulator to diligently undertake their respective responsibilities and to cooperate in those matters that are necessary to ensure that full advantage is taken of the new provisions of the law.

133 Cong. Rec. H 11809, H 11873 (Dec. 18, 1987).

Furthermore, there now appears to be a split in the circuits as to whether there is a private right to enforce the Act. The Ninth Circuit, in *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir. 1989), *cert. den.*, 110 S.Ct. 867 (1990), and the Tenth Circuit in *Griffin v. Federal Land Bank of Wichita*, 902 F.2d 22 (10th Cir. 1990) held that there is no such right. A panel of the Eighth Circuit held

that such a right does exist. *Zajac v. Federal Land Bank of St. Paul*, 887 F.2d 844 (8th Cir. 1989). The panel opinion in *Zajac* was reconsidered *en banc*, and the *en banc* opinion of the Eighth Circuit held that there was no such right. However, four judges of the Eighth Circuit disagreed with the majority opinion, concluding that there is a private right to enforce the Act. *Zajac v. Federal Land Bank of St. Paul*, 909 F.2d 1181 (8th Cir. 1990). A split in the circuits was again created when the Fourth Circuit recently recognized a farmer-borrower's right to enforce the right of first refusal against a farm credit system institution in *Payne v. Federal Land Bank of Columbia*, No. 89-1028 (4th Cir., October 16, 1990) (App. D. p. 16a). While the *Payne* opinion does not explicitly discuss the question of whether there is a private right to enforce the right of first refusal, its discussion of the merits of the farmer's claims and reversal of the district court's dismissal of the case for failure to state a claim upon which relief can be granted constitute an implicit recognition that such a right exists.

Mr. Perkins asks this court to decide the question presented in this petition to resolve the implicit conflict in the circuits, and, most importantly, because the question is one of extraordinary national significance.

Congress Intended to Create a Private Right of Action to Enforce the Act

The paramount consideration in determining whether to infer a private right of action under a federal statute is the intent of Congress. *Thompson v. Thompson*, 484 U.S. 174 (1988). As the court stated in *Thompson*:

> The implied cause of action doctrine would be a virtual dead letter were it simply limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause of action. Rather, as an implied cause to action doctrine suggests, the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question. We therefore have recognized that Congress' intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment. *Thompson*, 484 U.S. at p. 179. (citations omitted).

It is clear from the legislative history of the Act that Congress no longer believed that the existing statutory structure could provide meaningful relief to distressed farmer-borrowers. *Zajac*, 887 F.2d at pp. 854-855. Therefore, one version of the Senate bill for the Act, S. 1156, 100th Cong., 1st Sess., 133 Cong. Rec. 11750 (August 7, 1987) included an express private right to action, as did the version of the 1987 Act which the House sent to conference committee. H.R. 3030, 100th Cong., 1st Sess., 133 Cong. Rec. 7638, 7692 (September 21, 1987). However, the Senate conferees were directed to omit the express right of action included in the House bill because the Senate floor leaders were under the mistaken impression that such a right already existed, and that the House provision would unduly restrict this right. S. 1665, 100th Cong., 1st Sess., 133 Cong. Rec. 16993, 16995 (December 2, 1987).

The Senate's intent to create a private right to enforce the right of first refusal is also shown by Sen. Rep. 100-230, p. 35, 100th Cong., 1st Sess., which states that

farmer-borrowers whose land is transferred in violation of the right of first refusal may seek damages against FCS institutions. Thus, the legislative history of the Act demonstrates that Congress as a whole intended to allow private enforcement of the right of first refusal. The intent of the House to create that right is demonstrated by its enactment of an express private right of action. The intent of the Senate to create that right is demonstrated by the directions of the floor leaders guiding passage of the Act to the Senate conferees, and by the above-cited portions of Sen. R. 100-230.

The Remaining *Cort v. Ash* Factors Favor Recognition of a Private Right of Enforcement of the Right of First Refusal

Although the intent of Congress is the most important factor in determining whether a federal statute creates a private right of action, also of continued relevance are the remaining factors for determining this question set forth in *Cort v. Ash*, 422 U.S. 66 (1975): whether the plaintiff was one of the class for whose special benefit the statute was enacted, whether inferring a private right of action is consistent with the underlying purpose of the statute, and whether the cause of action is one traditionally relegated to state law.

As the panel opinion in *Zajac* recognized, farmer-borrowers are a protected class under the Act because its language and structure establish broad rights for borrowers and mandatory duties for lenders. A private cause of action will be readily found where the language of a statute explicitly confers a right directly on a class of

persons that includes the plaintiff. *Zajac*, 887 F.2d at 856 (citations omitted).

Inferring a private right of action would be consistent with the purposes of the Act, which include not only providing stability to the farm credit system, but also allowing family farmers to remain on their land. Preamble to P.L. 100-233; *Zajac*, 887 F.2d at pp. 854-855. Congress was careful to limit the right of first refusal to the beginning of the foreclosure sale process, and contemplated that this right would encourage negotiations between farmer-borrowers and FCS institutions which would frequently result in farmers' repurchase of their land at less than fair market value. The careful balance struck by Congress between the rights of farmer-borrowers and the needs of FCS institutions when it enacted the right of first refusal would be eliminated if farmers could not enforce this right. *Leckband v. Naylor*, 715 F.Supp. 1451, 1455 (D.Minn. 1988), *app. dismissed*, No. 88-5301 (8th Cir. June 8, 1989).

Furthermore, this court has been much more likely to infer a cause of action when a statute does not contain a comprehensive remedial scheme that indicates an intent to preclude other remedies. *Wright v. City of Roanoke Redevelopment Authority*, 479 U.S. 418, 423 (1987); *Middlesex County Sewage Authority v. National Sea Clammers Association*, 453 U.S. 1,20 (1981). The administrative remedy contained in the Act, the power of the Farm Credit Administration to initiate and enforce cease and desist orders against FCS institutions, is neither comprehensive, timely, nor adequate to protect the right of first refusal. *Leckband*, 715 F. Supp. at p. 1455; *Zajac*, 887 F.2d at p. 855.

Finally, protecting the right of first refusal is not a traditional state concern. *Leckband*, 715 F. Supp. at p. 1455. The FCS is a nationwide system created by Congress, and the systemwide requirements of the Act are matters of federal importance and concern. *Zajac*, 887 F.2d at p. 856.

CONCLUSION

The question presented is of paramount importance to the FCS as a whole, to its lenders and borrower-shareholders, and, because of the 1987 infusion of federal funds into the system, the taxpayer as well. Moreover, the recent Fourth Circuit opinion in *Payne* appears to conflict with the holdings of the Eight, Ninth and Tenth Circuits that there is no private right to enforce the Act. Mr. Perkins therefore respectfully requests that his petition for certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CALVIN J. PERKINS, Plaintiff-Appellant, v. THE FARM CREDIT BANK OF WICHITA, formerly known as The Federal Land Bank of Wichita, a body corporate and federally chartered instrumentality of the United States organized pursuant to 12 U.S.C. Section 2011; KATHERINE A. WUNDERLICH; RODNEY C. CLASS-ERICKSON; CHERYL L. CLASS-ERICKSON, as assignees of the Farm Credit Bank of Wichita, Defendants-Appellees.	)	No. 90-1095 (D.C. No. 89-C-2034) (Dist. of Colorado) Filed AUG 17 1990

ORDER AND JUDGMENT*

Before ANDERSON, BALDOCK, and EBEL, Circuit Judges.

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Calvin Perkins brought this action against the defendants for damages and other relief stemming from the foreclosure and transfer of his agricultural property. Perkins' complaint alleged noncompliance by the defendants with the Agricultural Farm Credit Act of 1987 ("the 1987 Act") which prescribes a right of first refusal prior to any transfer of foreclosed property. 12 U.S.C. § 2219a. The district court granted the defendants' motion to dismiss and motion for summary judgment on the ground that no private right of action exists for violations of the 1987 Act. This appeal followed.

This court has joined the Ninth Circuit in holding that no implied private right of action exists under the 1987 Act. *Griffin v. Federal Land Bank of Wichita*, 902 F.2d 22, 24 (10th Cir. 1990); *accord Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 867 (1990). *But see Zajac v. Federal Land Bank of St. Paul*, 887 F.2d 844 (8th Cir. 1989) (vacated pending rehearing en banc). We view our decision in *Griffin* as dispositive; we decline to adopt Perkins' suggested approach of treating each individual section of the Act differently. As we noted in *Griffin*, the Ninth Circuit's decision in *Harper* adequately considered the relevant factors promulgated by the Supreme Court in determining that no implied private right of action exists. The reasoning of Harper is

applicable to the entire Act. *See Harper*, 878 F.2d at 1174-77 (citing, *e.g.*, *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

The judgment of the district court is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Stephen H. Anderson
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 89-C-2034

CALVIN J. PERKINS,

Plaintiff(s),

v.

FARM CREDIT BANK OF WICHITA, et al.,

Defendant(s).

(Filed Mar. 10, 1989)

ORDER

CARRIGAN, J.

Plaintiff instituted this action under the Agricultural Credit Act of 1987, Public Law No. 100-233, ("the 1987 Act"), amending 12 U.S.C. §§ 2002 *et sec.*, to recover damages and to obtain injunctive and declaratory relief as a result of the defendants' alleged violation of the 1987 Act. Plaintiff has asserted claims for breach of fiduciary duty (First Claim); illegal conveyance (Second Claim); statutory violation (Third Claim); and violation of constitutional due process (Fourth Claim) based on allegations that he was not afforded his statutory right of first refusal to reacquire previously owned farm lands sold through foreclosure.

Defendants are the Farm Credit Bank of Wichita ("FCB"); Katherine A. Wunderlich; and Rodney C. and Cheryl L. Class-Erickson ("the Class-Erickson defendants").

Defendant FCB has filed a motion for summary judgment and judgment on the pleadings. The Class-Erickson defendants have filed a motion to dismiss the complaint. Plaintiff has responded by opposing both motions.

The parties have fully briefed the issues and oral argument would not assist my decision. Jurisdiction exists under 28 U.S.C. § 1331.

According to the complaint, in 1970, the plaintiff owned 9,200 acres of agricultural real estate in Archuleta County, Colorado. From 1970 through 1983, the plaintiff borrowed certain sums from the defendant FCB and its predecessors, the Federal Land Bank of Wichita and the Ninth District Production Credit Association of Wichita. As a result of the plaintiff's alleged default under the terms of the parties' promissory note and mortgage, in 1987 the defendant FCB initiated a judicial foreclosure action in Archuleta County District Court involving the plaintiff's agricultural lands. On May 27, 1987, the state court issued a judgment and decree of foreclosure scheduling the property for sale.

Plaintiff thereafter instituted Chapter 11 bankruptcy proceedings in the United States Bankruptcy Court for the District of Colorado. Those proceedings were dismissed on October 6, 1988.

On March 28, 1989, a Sheriff's sale of the plaintiff's property was conducted in Archuleta County. Defendant FCB received Certificates of Purchase on certain parcels of the property subject to the plaintiff's right of redemption which was set to expire on September 28, 1989. In April and May 1989, the defendant FCB sold two of its

certificates of purchase to co-defendants Wunderlich and the Class-Ericksons.

Plaintiff failed to timely exercise his redemption rights and the defendants ultimately obtained Sheriff's deeds to the property. Plaintiff contends that these property transfers occurred without his consent and in violation of the 1987 Act.

In their dispositive motions, the defendants contend that 12 U.S.C. § 2219a(a), upon which this suit is predicated, does not provide the plaintiff with a private right of action to enforce the 1987 Act. Section 2219a(a) provides as follows

> "Agricultural real estate that is acquired by an institution of the [Farm Credit System] as a result of a loan foreclosure or a voluntary conveyance by a borrower (hereinafter in this section referred to as the 'previous owner') who, as determined by the institution, does not have the financial resources to avoid foreclosure (hereinafter in this section referred to as 'acquired real estate') shall be subject to the right of first refusal of the previous owner to repurchase or lease the property, as provided in this section."

In support of their argument, the defendants rely on *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1173 (9th Cir. 1989), in which the Court of Appeals for the Ninth Circuit concluded that the 1987 Act does not provide a private right of action. In reaching its conclusion, the appellate court analyzed the issue by applying the four factors enunciated in *Cort v. Ash*, 422 U.S. 66, 78 (1975): (1) whether the plaintiff is a member of a special class for whose benefit the statute was enacted; (2) whether legislative intent, explicit or implicit, indicates that a private

right of action has been created; (3) whether implying a private right of action is consistent with the underlying purposes of the legislative scheme; and (4) whether the claim created involves an area basically of state concern so that a private right of action based solely on federal law would be inappropriate.

The Ninth Circuit determined that its inquiry should focus on the intent of Congress in passing the 1987 Act. The court initially noted that no private right of action existed under various predecessor statutes to the 1987 Act. Congressional statements indicated that an express private right of action was proposed in both houses of Congress but was deleted in the 1987 Act's final conference version. Finally, the Ninth Circuit closely examined the 1987 Act, noting that it provided comprehensive administrative remedies through which the applicant/borrower, by counsel, may seek review of adverse decisions. As previously indicated, the *Harper* court concluded that no private right of action exists under the 1987 Act.

More recently, the federal district court in *Walker v. Federal Land Bank of St. Louis*, 726 F. Supp. 211 (C.D.Ill. 1989), reached the same conclusion based on somewhat different reasoning. The district court there stated:

> "[I]t is clear that the 1987 Act was carefully crafted to closely balance the competing interests of the Farm Credit System and the American farmers. Implying a private right of action would assuredly disrupt that close balance, and hence would clearly thwart the Congressional purpose." *Id.* at 217.

In his responsive brief, the plaintiff cites *Zajac v. Federal Land Bank of St. Paul*, 887 F.2d 844 (8th Cir. 1989) in which the Eighth Circuit Court of Appeals ruled that the 1987 Act did confer a private right of action. *Zajac* was followed in *Hill v. Farm Credit Bank of St. Louis*, 726 F. Supp. 1201 (E.D.Mo. 1989). *See also, Leckband v. Naylor*, 715 F. Supp. 1451 (D.Minn. 1988) (pre-*Zajac* opinion holding that 1987 Act creates implied private right of action). On December 7, 1989, however, the *Zajac* opinion was vacated and rehearing granted for *en banc* consideration. I thus do not consider *Zajac*, *Hill* or *Leckband* persuasive.

For the reasons stated in *Harper, supra*, and *Walker, supra*, I conclude that no private right of action exists under the 1987 Act. In so ruling, I note that I reached the same conclusion in considering the Farm Credit Act as amended in 1985. *Schroder v. Volcker*, 646 F. Supp. 132 (D.Colo. 1986), aff'd 864 F.2d 97 (10th Cir. 1988).

In *Renick Bros. v. Federal Land Bank Ass'n of Dodge City*, 721 F. Supp. 1198 (D. Kan. 1989), the court concluded that the 1987 Act created no implied right of action following the Ninth Circuit's rationale in *Harper, supra*, and two previous rulings by Judge Richard Rogers of that district on the same subject. *Id.* at 1200. Plaintiff in *Renick Bros.* sought damages and injunctive relief for alleged violations of the 1987 Act. Plaintiff's argument in the instant case that he has an enforceable private right of action for damages and an injunction under the 1987 Act is not supported by the law or the Act's legislative history.

Accordingly, IT IS ORDERED that:

1. Defendant Farm Credit Bank of Wichita's motion for summary judgment and judgment on the pleadings is granted;

2. The motion to dismiss filed by the defendants Rodney C. and Cheryl L. Class-Erickson is granted;

3. Plaintiff's complaint and action are dismissed; and

4. Each party shall pay his, her or its own costs.

Dated at Denver, Colorado March 16, 1990.

BY THE COURT:

/S/ Jim R. Carrigan
JIM R. CARRIGAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE JIM R. CARRIGAN

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the Order signed by Judge Carrigan to:

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/S/ Monique Alexander
Deputy Clerk
Dated: March 16, 1990
Re: 89-C-2034

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§ 2219a. Right of first refusal

(a) General rule. Agricultural real estate that is acquired by an institution of the System as a result of a loan foreclosure or a voluntary conveyance by a borrower (hereinafter in this section referred to as the "previous owner") who, as determined by the institution, does not have the financial resources to avoid foreclosure (hereinafter in this section referred to as "acquired real estate") shall be subject to the right of first refusal of the previous owner to repurchase or lease the property, as provided in this section.

(b) Application of right of first refusal to sale of property. (1) Election to sell and notification. Within 15 days after an institution of the System first elects to sell acquired real estate, or any portion of such real estate, the institution shall notify the previous owner by certified mail of the owner's right–

> (A) to purchase the property at the appraised fair market value of the property, as established by an accredited appraiser; or
>
> (B) to offer to purchase the property at a price less than the appraised value.

(2) Eligibility to purchase. To be eligible to purchase the property under paragraph (1), the previous owner must, within 30 days after receiving the notice required by such paragraph, submit an offer to purchase the property.

(3) Mandatory sale. An institution of the System receiving an offer from the previous owner to purchase the property at the appraised value shall, within 15 days after the receipt of such offer, accept such offer and sell the property to the previous owner.

(4) Permissive sale. An institution of the System receiving an offer from the previous owner to purchase the property at a price less than the appraised value may accept such offer and sell the property to the previous owner. Notice shall be provided to the previous owner of the acceptance or rejection of such offer within 15 days after the receipt of such offer.

(5) Rejection of offer of previous owner. (A) Duties of institution. An institution of the System that rejects an offer from the previous owner to purchase the property at a price less than the appraised value may not sell the property to any other person–

(i) at a price equal to, or less than, that offered by the previous owner; or

(ii) on different terms and conditions than those that were extended to the previous owner,

without first affording the previous owner an opportunity to purchase the property at such price or under such terms and conditions.

(B) Notice. Notice of the opportunity in subparagraph (A) shall be provided to the previous owner by certified mail, and the previous owner shall have 15 days in which to submit an offer to purchase the property at such price or under such terms and conditions.

(c) Application of right of first refusal to leasing of property. (1) Election to lease and notification. Within 15 days after an institution of the System first elects to lease acquired real estate, or any portion of such real estate, the institution shall notify the previous owner by certified mail of the owner's right–

(A) to lease the property at a rate equivalent to the appraised rental value of the

property, as established by an accredited appraiser; or

(B) to offer to lease the property at a rate that is less than the appraised rental value of the property.

(2) Eligibility to lease. To be eligible to lease the property under paragraph (1), the previous owner must, within 15 days after receiving the notice required by such paragraph, submit an offer to lease the property.

(3) Mandatory lease. An institution of the System receiving an offer from the previous owner to lease the property at a rate equivalent to the appraised rental value of the property shall, within 15 days after the receipt of such offer, accept such offer and lease the property to the previous owner unless the institution determines that the previous owner–

(A) does not have the resources available to conduct a successful farming or ranching operation; or

(B) cannot meet all of the payments, terms, and conditions of such lease.

(4) Permissive lease. An institution of the System receiving an offer from the previous owner to lease the property at a rate that is less than the appraised rental value of the property may accept such offer and lease the property to the previous owner.

(5) Notice to previous owner. An institution of the System receiving an offer from the previous owner to lease the property at a rate less than the appraised rental value of the property shall notify the previous owner of its acceptance or rejection of the offer within 15 days after the receipt of such offer.

(6) Rejection of offer of previous owner. (A) Duties of institution. An institution of the System rejecting an offer from the previous owner to lease the property at a rate less than the appraised rental value of the property may not lease the property to any other person–

(i) at a rate equal to or less than that offered by the previous owner; or

(ii) on different terms and conditions than those that were extended to the previous owner,

without first affording the previous owner an opportunity to lease the property at such rate or under such terms and conditions.

(B) Notice. Notice of the opportunity described in subparagraph (A) shall be given to the previous owner by certified mail, and the previous owner shall have 15 days after the receipt of such notice in which to agree to lease the property at such rate or under such terms and conditions.

(d) Public offerings. (1) Notification of previous owner. If an institution of the System elects to sell or lease acquired property or a portion thereof through a public auction, competitive bidding process, or other similar public offering, the institution shall notify the previous owner, by certified mail, of the availability of the property. Such notice shall contain the minimum amount, if any, required to qualify a bid as acceptable to the institution and any terms and conditions to which such sale or lease will be subject.

(2) Priority. If two or more qualified bids in the same amount are received by the institution under paragraph (1), such bids are the highest received, and one of the qualified bids is offered

by the previous owner, the institution shall accept the offer by the previous owner.

(3) Nondiscrimination. No institution of the System may discriminate against a previous owner in any public auction, competitive bidding process, or other similar public offering of property acquired by the institution from such person.

(e) Term or condition. For the purposes of this section, financing by a System institution shall not be considered to be a term or condition of a sale of acquired real estate.

(f) Financing. Notwithstanding any other provision of this section, a System institution shall not be required to provide financing to the previous owner in connection with the sale of acquired real estate.

(g) Mailing of notice. Notwithstanding any other provision of this section, each certified mail notice requirement in this section shall be fully satisfied by mailing one certified mail notice to the last known address of the previous owner.

(h) State laws. The rights provided in this section shall not diminish any such right of first refusal under the law of the State in which the property is located.

(i) Applicability. This section shall not apply to a bank for cooperatives.

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1028

ROBERT HAVEN PAYNE,

Plaintiff-Appellant,

versus

FEDERAL LAND BANK OF COLUMBIA,

Defendant-Appellee,

MOUNTAIN FEDERAL LAND BANK ASSOCIATION; MOUNTAIN FARM CREDIT SERVICES; MAXIE LOVE, JR., in his capacity as President of the Federal Land Bank of Columbia; EDWIN E. FRIZZELL, in his capacity of Executive Vice President and Chief Credit Manager of the Mountain Farm Credit Services,

Defendants,

UNITED FARMERS ORGANIZATION,

Amicus Curiae.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Richard L. Voorhees, District Judge. (CA-88-145-A-C)

Argued: January 10, 1990 Decided: October 16, 1990

Before WIDENER and SPROUSE,* Circuit Judges, and KELLAM, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Vacated and remanded by published opinion. Judge Widener wrote the opinion, in which Senior Judge Kellam joined.

ARGUED: Charles David Gantt, Asheville, North Carolina, for Appellant. Steven Kropelnicki, Jr., CARTER & KROPELNICKI, P.A., Asheville, North Carolina, for Appellee.

WIDENER, Circuit Judge:

Robert Haven Payne, appellant, is a farmer in Madison County, North Carolina. He purchased property in 1969 and mortgaged it to Federal Land Bank of Columbia to secure a loan. He defaulted on the loan and the bank foreclosed on the property. The bank bought the property at the foreclosure sale on December 3, 1987.

On April 21, 1988, the bank sent Payne a certified letter advising him that the property would be sold at a public auction on May 18, 1988. The letter notified Payne of his right to repurchase the property by matching the

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* Judge Sprouse was a member of the panel which heard oral argument in the case, but he later recused himself. He did not participate in the decision, which is filed by a quorum of the panel. 28 U.S.C. § 46(d).

high bid submitted at the auction. Payne did not bid at the auction or match the winning bid. As a result, the property was sold to a third party.

On June 3, 1988, Payne filed suit in United States District Court for the Western District of North Carolina claiming that the bank did not comply with a provision of the Agricultural Credit Act, 12 U.S.C. § 2219a (1989). The district court noted in its opinion that Payne filed a *lis pendens* and that the sale to the successful bidder at the auction has not been completed. On April 17, 1989, the district court dismissed the case under Fed. R. Civ. P. 12(b) (6) for failure to state a claim on which relief could be granted. As well, it dismissed Payne's motion for a temporary restraining order, preliminary injunction and partial summary judgment on grounds of mootness. Payne appeals from that judgment. The issue on appeal is whether the bank complied with its statutory obligation to give Payne a right of first refusal before selling the property to a third party.[1] We hold that it did not.

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[1] The statute, 12 U.S.C. § 2219a, provides in pertinent part, with the catchline "Right of first refusal."

> **(a) General rule**
>
> Agricultural real estate that is acquired by an institution of the System as a result of a loan foreclosure or a voluntary conveyance by a borrower (hereinafter referred to in this section as the "previous owner") who, as determined by the institution, does not have the financial resources to avoid foreclosure (hereinafter referred to in this section as "acquired real estate") shall be subject to the right of first refusal of the previous owner to repurchase or lease the property, as provided in this section.

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Payne claims that subsections (a), (b) and (d) of the statute should each be given effect. In other words, to

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(b) Application of right of first refusal to sale of property

(1) Election to sell and notification

Within 15 days after an institution of the System first elects to sell acquired real estate, or any portion of such real estate, the institution shall notify the previous owner by certified mail of the owner's right–

(A) to purchase the property at the appraised fair market value of the property, as established by an accredited appraiser; or

(B) to offer to purchase the property at a price less than the appraised value.

(2) Eligibility to purchase

To be eligible to purchase the property under paragraph (1), the previous owner must, within 30 days after receiving the notice required by such paragraph, submit an offer to purchase the property.

(3) Mandatory sale

An institution of the System receiving an offer from the previous owner to purchase the property at the appraised value shall, within 15 days after the receipt of such offer, accept such offer and sell the property to the previous owner.

(4) Permissive sale

An institution of the System receiving an offer from the previous owner to purchase the property at a price less than the appraised value may accept such offer and sell the property to

(Continued on following page)

dispose of the property at a public sale, the bank must comply with subsections (a) and (b) as well as subsection

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the previous owner. Notice shall be provided to the previous owner of the acceptance or rejection of such offer within 15 days after the receipt of such offer.

(5) Rejection of offer of previous owner

(A) Duties of institution

An institution of the System that rejects an offer from the previous owner to purchase the property at a price less than the appraised value may not sell the property to any other person–

(i) at a price equal to, or less than, that offered by the previous owner; or

(ii) on different terms and conditions than those that were extended to the previous owner,

without first affording the previous owner an opportunity to purchase the property at such price or under such terms and conditions.

* * *

(B) Notice

Notice of the opportunity in subparagraph (A) shall be provided to the previous owner by certified mail, and the previous owner shall have 15 days in which to submit an offer to purchase the property at such price or under such terms and conditions.

* * *

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(d). This interpretation, however, is not consistent with the federal regulations which treat the subsections as alternatives. *See* 12 C.F.R. § 614.4522 (1989).[2] It is at once

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(d) Public offerings

(1) Notification of previous owner

If an institution of the System elects to sell or lease acquired property or a portion thereof through a public auction, competitive bidding process, or other similar public offering, the institution shall notify the previous owner, by certified mail, of the availability of the property. Such notice shall contain the minimum amount, if any, required to qualify a bid as acceptable to the institution and any terms and conditions to which such sale or lease will be subject.

(2) Priority

If two or more qualified bids in the same amount are received by the institution under paragraph (1), such bids are the highest received, and one of the qualified bids is offered by the previous owner, the institution shall accept the offer by the previous owner.

[2] The part of the regulation applying to sales of the acquired property parallels the statute except for the underscored portion. It states in pertinent part:

> *Except as provided in paragraph (e) of this section,* System institutions electing to sell acquired property . . .
>
> (1) Shall notify the previous owner by certified mail, within 15 days of the decision to sell the property, of the appraised fair market value of the property as established by an accredited appraiser and of the right:

(Continued on following page)

apparent that the portion of the regulation speaking to public sales, 12 C.F.R. § 614.4522(e), does not provide for a right of first refusal for a period of 30 days, a right explicitly given to the previous owners by subsections (a) and (b) of the statute. Indeed the regulation effectively reads subsection (b) out of the statute if the bank elects to sell at public auction. Thus, the question in this appeal is whether the interpretation of the statute provided by the regulations is "sufficiently reasonable" under *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978), to be accepted by a reviewing court. Because the interpretation of the statute found in 12 C.F.R. § 614.4522 does not provide for a right of first refusal after the bank first "elects to sell" the property pursuant to § 2219a(a) and (b)(1), we are of opinion the interpretation found in the federal regulations is not reasonable and reverse.

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> (i) To purchase the property at the appraised fair market value. . . .

12 C.F.R. § 614.4522 (c). Subsection (e) of the same regulation parallels subsection (d) of the statute and provides

> (e) System institutions electing to sell or lease acquired property or a portion thereof through a public auction, competitive bidding process, or other similar public offering:
>
> (1) Shall notify the previous owner, by certified mail, of the availability of such property. Such notice shall contain the minimum amount, if any, required to qualify a bid as acceptable to the institution and any terms or conditions to which such sale or lease will be subject. . . .

12 C.F.R. § 614.4522 (e)(1989).

The district court correctly noted that the origin of any statutory construction is the statute itself. *Payne v. Federal Land Bank of Columbia*, 711 F. Supp. 851, 853 (W.D.N.C. 1989) *quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Subsection (a) addresses in general terms the right of first refusal. It provides that the real estate *"shall be subject to the right of first refusal* of the previous owner to repurchase or lease the property, as provided in this section." 12 U.S.C. § 2219a(a) (emphasis added). The plain meaning of subsection (a), especially as annunciated by the notice required in § (b)(1), is that the property should first be offered to the previous owner before the property is sold or leased. The subsection addressing public offerings, subsection (d), however, does not refer to the right of first refusal as annunciated by the notice and offer provisions of § (b). Nothing in subsection (d) serves as any indication of any negation or watering down of the right of first refusal mentioned in subsections (a) and (b), granted in the same statute, and enacted at the same time.

As well as subsection (a), the language of subsection (b)(1) is quite clear and needs no construction. When the institution "first elects to sell" the property, it must follow the procedures set out in the remainder of subsection (b). Accordingly, when the institution "first elects to sell" the property, it must give the previous owner of the property notice of the right of first refusal to purchase the property at appraised value or to make an offer at less than appraised value. This section applies whether the property is to be sold at a private sale or a public auction. The terms of the statute are plain and unambiguous, which should be sufficient to end the discussion, for the

Supreme Court has stated, "[u]nless exceptional circumstances dictate otherwise, judicial inquiry into the meaning of the statute is complete once the Court finds that the terms of the statute are unambiguous." *Rubin v. United States*, 449 U.S. 424, 430 (1981).

If that were not enough, however, the legislative history bolsters our conclusion. The part of legislative history which is given the most weight is the conference report. "Inasmuch as the conference report represents the final statement of terms agreed upon by both houses of Congress, next to the statute itself, it is the most persuasive evidence of the Congressional intent behind the enactment of the statute." *Davis v. Lukhard*, 788 F.2d 973, 981 (4th Cir.), *cert. denied*, 479 U.S. 868 (1986).

The conference report indicates that both the House and the amended Senate versions of the legislation would establish a right of first refusal "under which the borrower would have the first option to reacquire the foreclosed property when the FCS institution disposes of it." 100th Cong., 1st Sess., 1987 U.S. Code Cong. & Admin. News 2956, 2971. There is no indication in a close reading of the legislative history that the right of first refusal described in subsections (a) and (b) of the statute is either superceded or was limited to that described in subdivision (d) of the statute by offering the property at public sale by auction or otherwise. Indeed, the conference report on this particular section of the legislation, which is found in 1987 U.S. Code Cong. & Admin. News at 2971-2973, on page 2971 describes the notice required by § (b)(1) as being "triggered" when the institution "first elects to sell" without other limitation and without reference to public sale. The notice provision of § (b)(1) was

"triggered" at the latest when the bank wrote its letter of April 21, 1988, yet the bank did not comply with § (b)(1) of the statute.

In addition to the literal wording of the statute and the legislative history, *Sutherland on Statutory Construction*, 4th Ed., Sands, § 46.05, p. 91, quoting from *Sturges v. Crowninshield*, 4 Wheat. (17 U.S.) 122, 202-03 (1819), on the subject of two provisions in the same instrument states:

> Yet, in most cases, the plain meaning of a provision not contradicted by any other provision in the same instrument, is not to be disregarded because we believe the framers of the instrument could not intend what they say. It must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hesitation, unite in rejecting the application.

We do not find that Congress did not mean what it said in subsections (a) and (b)(1) of the statute, much less that there is any absurdity or injustice in applying literally the provision for a first refusal.

In conclusion, supported by the plain language of the statute, the legislative history, *Sutherland*, and *Sturges*, we are of opinion that the bank was required to give Payne a right of first refusal under subsections (a) and (b)(1) of the statute.

The judgment of the district court is accordingly vacated and the case is remanded for proceedings not inconsistent with this opinion.

VACATED AND REMANDED